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POST-MORTEM SPERM PROCUREMENT: IS IT LEGAL?

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Florida: *A violent car accident leaves a newlywed widow but not able to conceive the child of her dead husband.*[1]

New York: *A vacation turns tragic when an altercation with police ends a man's life.*[2] *But his death does not end his wife's dreams of having his children.*[3]

Chicago: *A woman offers not only condolences upon the death of her friend's husband, but the suggestion that she have his sperm*

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[1]William Lowther, *I Want a Baby by My Dead Husband; Ethics Row After Sperm is Taken from Crash Victim*, ASSOCIATED NEWSPAPERS LTD., June 19, 1994, at 13; Rowland Stiteler, *Liquid Assets; Dwight Brunoehler Is an Altogether Different Kind of Banker, Who Offers Life Itself as a Return on Investment. For the Wife and Mother of Manny Maresca, That Was the Bottom Line*, ORLANDO SENTINEL, Sept. 11 1994, at 8; *see also*, Kathleen Murray, *Posthumous Conception an Ethical Trap*, STAR TRIB., Aug. 1 1995 (providing updated information on Pamela Maresca's decision).

[2]Carole Agus, *Drop of Life; Docs Rush to Save Sperm of Man Killed in Cop Struggle*, NEWSDAY, Jan. 19, 1995, at A3; Carole Agus, *Sperm Taken from Corpse in N Y First*, TORONTO STAR, Jan. 20, 1995, at A14; *Widow Hopes to Have Child Using Dead Husband's Sperm*, CHI. TRIB., Jan. 20, 1995, at 4.

[3]Carole Agus, *Drop of Life; Docs Rush to Save Sperm of Man Killed in Cop Struggle*, NEWSDAY, Jan. 19, 1995, at A3; Carole Agus, *Sperm Taken from Corpse in N Y First*, TORONTO STAR, Jan. 20, 1995, at A14; *Widow Hopes to Have Child Using Dead Husband's Sperm*, CHI. TRIB., Jan. 20, 1995, at 4.

> *retrieved and frozen so that in the future she could have his children.*[4]
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> London: *Like most wives, she wants to have her husband's baby because she loves him and wants to have a baby that is the embodiment of that love and spirit.*[5] *The problem, or maybe not, is he died of meningitis before conception.*[6]
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> Los Angeles: *A doctor in Los Angeles gives these women and others hope.*[7] *He has confirmed that one of his patients is pregnant with the child of her dead husband using sperm retrieved after his death.*[8]

These scenarios represent the media debut of a procedure, post-mortem sperm procurement, in which viable sperm are obtained from cadavers.[9] This procedure is thought to be so uncommon that it has made headlines when it has occurred. However, the first report of post-mortem sperm procurement appeared in the medical literature in 1980 when Dr. Cappy Rothman published a method for obtaining viable sperm from a deceased male.[10] The procedure was used on a thirty-year-old man who had died in a motorcycle accident and whose family sought to preserve his sperm.[11] In his article, Dr. Rothman details the removal of the vas deferens, which is then flushed with Tyrode's solution.[12] The resulting solution is then

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[4]Louise Kiernan, *Widow Has Sperm of Her Husband Saved,* CHI. TRIB., Jan. 24, 1995, at 1.

[5]*Widow May Get OK to Use Her Husband's Frozen Sperm,* HOUS. CHRON., Feb. 7, 1997. Ms. Blood was granted possession of the sperm but because of the mandates set forth by England's Human Fertilization (sic) and Embryology Authority, she was not able to use it for *in vitro* fertilization without her husband's written consent. Ms. Blood is looking into traveling to another European country with less strict laws to have the procedure performed. *The Oprah Winfrey Show* (Syndicated television broadcast, Apr. 16, 1998).

[6]*Widow May Get OK to Use Her Husband's Frozen Sperm,* HOUS. CHRON., Feb. 7, 1997.

[7]*Doctor Says Sperm Taken from Man Just After Death Leads to Pregnancy, Boston Globe Online* (last modified July 16, 1998)< http://www.boston.com/dailynews/wire.html/>; *CBS This Morning,* (CBS television broadcast, July 20, 1998) (Interview with Dr. Cappy Rothman who performed the retrieval, *in vitro* fertilization and implantation).

[8]*Id.*

[9]*See* Cappy M. Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State,* 34 FERTILITY & STERILITY 512 (1980).

[10]*See id.*

[11]*See id.*

[12]*See id.*

centrifuged to obtain the viable semen.[13] The semen can then be cryopreserved for future use.[14] Since 1980, other methods for post-mortem sperm retrieval have evolved. These include epididymal extraction,[15] epididymal aspiration, vas deferens irrigation[16] and electroejaculation.[17]

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[13]*See id.*

[14]*See* Rothman, *supra* note 9, at 512.

[15]Epididymal extraction is performed as follows:

> After a declaration of death, an incision is made over the prostatic fascia to expose the pelvic vas, ampulla and seminal vesicle. Place the excised segments in Tyrode's solution. Perform a bilateral vasoseminal vesiculectomy to expose the testis through an intravaginal scrotal incision. Excise the epididymis from the efferent ductules to the convoluted tubules and place in Tyrode's solution. After obtaining the excurrent duct system, excise the seminal vesicle from the vas and the ampulla. Flush the vas segment with 3 ml of Tyrode's solution. Motile sperm should be observable microscopically. If mobile, mix these sperm with glycerol and place in 1 ml vials for cryopreservation.
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> Next, remove the epididymal fascia exposing the tubules. Resect the epididymal head from the body and tail, and mince with microscissors. Treat motile sperm with glycerol and place in 1 ml vials for cryopreservation in liquid nitrogen at -196û C.

Rothman, *supra* note 9, at 512.

[16]Vas deferens irrigation is performed as follows:

> After a declaration of death, sterilize the scrotum area. Manipulate right or left vas deferens under the median raphe and grasp with a ring clamp. Using a no-scalpel dissecting clamp, dissect the vas free of surrounding tissue Mobilize the vas out of the scrotal entry site. Using a 15û ultrasharp knife make a hemivasotomy. Insert a 22 gauge angiocatheter into the vasal lumen toward the epididymis. Irrigate the vas with 0.1 cc volumes of human tubal fluid medium. To prevent leakage out of the vasal lumen during irrigation, manually compress the vas around the angiocatheter. Also manipulate the epididymous to facilitate retrieval of fluid. Dilute the obtained fluid in a total volume of 3.9 cc of human tubal fluid. Return the vas to the scrotum. Procedure takes approximately 10 minutes.

Peter N. Schlegel, *Post-mortem Sperm Retrival: Technique and Exclusionary Criteria* (Feb. 6, 1995) (unpublished manuscript on file with the Department of Urology, The New York Hospital-Cornell Medical Center, 525 East 68th St., New York, NY 10021).

[17]Electroejaculation is performed as follows:

> Urinary pH should be neutralized and bowel movement induced to obtain optimal contact of the rectal electrode. Initially, complete catheterization of the bladder is performed and an insemination medium is instilled into the bladder as buffer With patient lying in the decubitus position, the electrical rectal probe is inserted

While techniques for procurement and storage of sperm have been available for more than a decade, it was not until June 1994 that the general public's attention was drawn to this unique procedure. Newlyweds Manny and Pamela Maresca made national news when Pamela stated she wanted to preserve the sperm of her deceased husband so that she could bear his child.[18] Within hours of his death, Manny's sperm was retrieved and preserved for Pamela's future use.[19] Subsequently, reports indicated that Pamela had discontinued birth control injections in preparation for becoming pregnant.[20]

Fifteen months later Pamela changed her mind.[21] She decided she did not wish to use her late husband's sperm to conceive.[22] Instead, her mother-in-law wants to use it![23] Forty-two year old Leslie Maresca, mother of six, wants to give birth to her own grandchild presumably using a donor egg.[24] Pamela states she is willing to consent to this use of the frozen sperm.[25] Because the physician retrieved enough viable sperm for

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into the rectum, with electrodes facing anteriorly. Stimulation is carried out in a sine wave summation pattern with progressively increasing voltage delivery. Throughout the procedure the current, voltage, and temperature of the probe are monitored.

An assistant milks the bulbous urethra to direct semen into a container, since emission is not coupled with any forceful projectile ejaculation. When it appears that the patient has no more fluid coming out of the urethra, stimulation is terminated. The bladder is then catheterized and the retrograde ejaculate, if present, is removed. The bladder is rinsed with buffered insemination medium to suspend any remaining sperm for extraction. Both antegrade and retrograde specimens are processed for use.

Pak H. Chung et al., *Assisted Fertility Using Electroejaculation in Men with Spinal Cord Injury-A Review of Literature*, 64 FERTILITY & STERILITY 1 (1995); *see also* Dana A. Ohl, *Electroejaculation*, 20 UROLOGY CLINICS OF NORTH AMERICA 181 (1993). Regardless of the procedure used, it is generally accepted that retrieval must be attempted within 24 hours of death to have any chance of retrieving viable semen. However, it is important to note that in the case of the only reported pregnancy, the sperm is said to have been retrieved some 30 hours post mortem. *See supra* note 5; *see also* G. J. Matthews & M. Goldstein, *A Simplified Method of Epididymal Sperm Extraction*, 47 UROLOGY 123-25 (1996).

[18]*See supra* note 1.

[19]*See supra id.*

[20]*See supra id.*

[21]*See* Interview with Ruth Streeter, producer of *60 Minutes*, in Philadelphia, Pa. (Sept. 9, 1995).

[22]*See id.*

[23]*See id.*

[24]*See id.*

[25]*See id.*

two insemination attempts, physicians are optimistic that using recently developed microinjection techniques such as intracytoplasmic sperm injection (ICSI), conception can be achieved.[26] The impediment in this scenario is that the sperm bank which holds Manny's frozen deposit wants Pamela to obtain a court order permitting it to legally release the deposit to Manny's mother.[27] This is only one of many stories involving post-mortem sperm procurement in which the medicine is much simpler than the legal and ethical questions involved.

Post-mortem sperm procurement is only one point on the expanding continuum of assisted reproductive technologies that perhaps began with the first reported case of human artificial insemination in 1770 and apparently has no end in sight.[28] Like other assisted reproductive technologies, the ability to procure sperm from deceased men, store it, and use it at a later date raises serious legal and ethical questions. Some such questions involve, what are the "rights" of the deceased? Should dead men be fathering children? Should a dead man become a father without his explicit consent? If consent is crucial, then who can give it if the deceased has not done so? What is in the best interest of a future child? Still other questions involve the "rights" of others to both procure and control sperm and its use after death, such as, who has a right to a deceased man's sperm? Should there be restrictions on who can use the sperm to try to conceive a child? Can those who would have no legal standing in a court of law ever request and utilize a cadaver's sperm, for instance long-standing heterosexual or homosexual partners? Should

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[26]*See* Lowther, *supra* note 1, at 13.

[27]*See* Streeter, *supra* note 21.

[28]*See* STEVEN KLING, SEXUAL BEHAVIOR AND THE LAW 59-60 (1965); *see generally* J. Robertson, CHILDREN OF CHOICE, (1994); E. Donald Shapiro & Benedene Sonneblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1987) (Prior to its use with humans, breeders used frozen bull semen to inseminate their cattle. It has been speculated that the first successful artificial insemination (AI) occurred in the 14th century when an Arab mare was inseminated with stallion semen. The first reported case of AI in human beings was in England in 1770. It was almost a century later, in 1866, that physician Marion Simms successfully inseminated a woman. Although sperm was being frozen as early as 1866, its use for artificial insemination was not consistently successful until 1949, when it was discovered that sperm frozen with the addition of glycerol had a better survival rate. Conception outside the human body was first achieved in 1969, and the first live birth resulting from such *in vitro* fertilization occurred in 1978. The first live birth resulting from previously frozen ova occurred in 1986, however success rates are very low because science has not perfected a method to unfreeze the fragile ova without damage. Pre-embryos seem heartier then ova and have been successfully frozen, thawed and implanted since the mid 1980's).

parents or family members be permitted to condition organ donation on post-mortem sperm retrieval? Can sperm retrieval be equated to organ donation? What if the deceased is a minor and the procurement is for lineage purposes? Finally, should retrieved sperm be made available for any purpose other than the conception of a child?

Many of these questions will require sustained societal examination and debate as well as legal intervention. However, before serious debate can begin to resolve any of these issues, two steps of the process of post-mortem sperm procurement must be addressed. First, it is necessary to determine the prevalence of post-mortem sperm procurement. Is it being requested and performed? If so, how frequently? And second, if it is being requested and performed, is it legal? Once these questions are clarified, the parameters of the debate will be defined, and productive oration to resolve the legal, medical and ethical questions associated with post-mortem sperm procurement can ensue.

Post-mortem sperm procurement is an illustrative example of the need for law to be prospective rather than retrospective in the field of reproductive technology: a field that impacts the people of today and the children of tomorrow. Thus, this discussion will focus on the legal issues associated with the isolated practice of retrieving sperm from dead men to create a new life. The first section will detail the prevalence of the requests for post-mortem sperm procurement and the reported performed procedures. The next section will discuss the law relating to dead bodies. Post-mortem sperm procurement involves a minimally invasive medical procedure on a dead body, as opposed to a live individual choosing to cryobank his sperm which is then used posthumously to produce offspring. Therefore, it is significantly different from other reported means of posthumous reproduction which may require the prior consent of the deceased. Thus, at the essence of the issue is, what rights, if any, does a dead person have? What legally can and cannot be done to a dead body? The following section will address procreative liberty: the right to and the right not to procreate. Does the right to procreate extend to non-coital reproduction? Does it extend to the dead? Does it extend to procreating with the dead? The final section will conclude that by application, analogy and extrapolation, it is legal to procure sperm from a dead man and use it for reproductive purposes. The question remains, however, whether simply because something is legal, implies that it should be performed. Presently this question is one of personal choice. The ethical, moral and religious factors that influence such a decision are beyond the

scope of this discussion, but one suggestion will be made: an amendment to the Uniform Anatomical Gift Act to include procurement of tissue for reproductive purposes. This would provide credence and clarity regarding post-mortem sperm procurement, which is one step in helping people make informed decisions in the arena of procreative liberty. It might also help to limit any potential litigation arising out of this controversial procedure.

THE STATUS OF POST-MORTEM SPERM PROCUREMENT

Post-mortem sperm procurement is being requested and performed throughout the United States at numbers greater than any newspaper or television medical drama could have speculated.[29] It is also probable that it is being requested and performed at numbers even greater than reported.[30] The concept of post-mortem sperm procurement is no longer an intellectual exercise for lawyers, physicians and bioethicists.

From 1980 through July 1995, forty fertility centers out of the 254 surveyed reported receiving a total of eighty-two requests for post-mortem sperm procurement.[31] More than half of these reported requests were made in the last year, indicating a rising trend and signaling a potential problem.[32] Furthermore, fifteen of these facilities reported honoring a total of twenty-five requests.[33] These requests and procedures are being made to and performed by facilities throughout the country.[34]

While these numbers may seem small, they are believed to be conservative estimates.[35] Because the population surveyed in the cited study targeted facilities specializing in *in vitro* fertilization and other reproductive technologies, they often reported being unequipped to perform post-mortem sperm procurement.[36] Specifically, eight facilities stated they would or did refer a request for post-mortem sperm

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[29]*See supra* notes 1, 2 and 3; *see also Chicago Hope* (CBS television broadcast, Sept. 25, 1995).

[30]*See* S.M. Kerr, *Post-Mortem Sperm Procurement*, 157 J. UROLOGY 2154-58, (1997).

[31]*See id.*

[32]*See id.*

[33]*See id.*

[34]*See id.*

[35]*See* Kerr, *supra* note 30, at 2154-58.

[36]*See id.*

procurement to a urologist.[37] Furthermore, given that the requests are primarily being made by women who are associated with men who died of a trauma, it is likely that a urologist in a hospital setting would be a more logical and accessible choice to present one's request for post-mortem sperm procurement than an assisted reproductive facility.[38]

Of the twenty-five procedures performed, all semen retrievals were reported as presently cryopreserved with the exception of one sample.[39] This sample was retrieved from a fifteen year old boy at the request of his parents, who some years later withdrew the sperm from storage.[40] The cryobank that held the deposit had no knowledge of its final disposition.[41]

There is no question that post-mortem sperm procurement has been and continues to be requested and performed at an increasing rate. With conservative estimates such as these, reproductive technologies being honed, and media attention mounting, this scenario begs the question: is it legal to take sperm from a dead man?

THE RELEVANT LAW RELATING TO DEAD BODIES

Status of the Deceased

"The earth belongs in usufruct to the living; the dead have neither powers nor rights over it."[42] This sentiment was echoed again, almost two centuries later in *Whitehurst v. Wright*[43] when the court stated, "[a]fter death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived."[44]

In *Whitehurst*, a man was gunned down by the Montgomery, Alabama police who mistook him for a local robbery suspect.[45] Authorities claimed that the fatal shot by police was in response to a shot fired at the officer by Whitehurst.[46] Initially, none of the officers in the

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[37]*See id.*
[38]*See id.*
[39]*See id.*
[40]*See* Kerr, *supra* note 30, at 2154-58.
[41]*See id.*
[42]THOMAS JEFFERSON, 7 JEFFERSON'S WORKS 454 (Monticello ed. 1904) (Letter to James Madison dated Sept. 6, 1789).
[43]Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979).
[44]*Id.* at 834.
[45]*See id.*
[46]*See id.*

vicinity found a gun near the body.[47] However, a detective later called to the scene found a gun twenty-seven inches from Whitehurst's body.[48] It was subsequently revealed that the gun was confiscated by the police in a drug raid one year prior to the shooting.[49]

In reaction to these suspect events, Ida Mae Whitehurst, mother of the deceased, brought suit under 42 U.S.C. §§ 1983, 1985 and 1986, claiming that the shooting and alleged cover-up accomplished under color of state law deprived her son of rights guaranteed by the fifth, sixth, thirteenth and fourteenth amendments to the United States Constitution.[50] The district court found that her claim under section 1983 for the alleged cover-up did not exist because if it took place at all, it was subsequent to Whitehurst's death and consequently could not have deprived him of any rights.[51] The court also determined that no claim was stated under section 1985 because any conspiracy to violate Whitehurst's civil rights ended with his death and could not be retroactively established.[52] The United States Court of Appeals for the Fifth Circuit affirmed the district court's opinion. The appellate court could find no case that recognized or refused to recognize the civil rights of a corpse,[53] and therefore, the court derived its decision from the rationale in *Roe v. Wade*.[54]

In *Roe*, the Supreme Court held that a fetus was not a person under the Fourteenth Amendment and has no rights thereunder.[55] Although the court acknowledged that the fetus had the potential for sustaining life in the future, this was not sufficient to find that the fetus was a person for purposes of the Fourteenth Amendment.[56] Extrapolating from this decision, the court in *Whitehurst* held that if being capable of sustaining life in the future was not sufficient for bestowing constitutional rights, then surely a corpse, having no potential for life, was not a person under the umbrella of the Constitution.[57]

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[47]*See id.*

[48]*See* Whitehurst, 592 F.2d at 834.

[49]*See id.*

[50]*See id.* at 835.

[51]*See id.*

[52]*See id.*

[53]From the date of the decision in *Whitehurst* to the time of this writing, the author could find no reported case that recognizes the civil rights of a corpse.

[54]Roe v. Wade, 410 U.S. 113 (1973).

[55]*See id.*

[56]*See id.*

[57]*See* Whitehurst v. Wright, 592 F.2d 834, 834 (5th Cir. 1979).

The argument that a corpse has no rights is further strengthened by the illegality of actions involving interference with dead bodies, such as treating a corpse in a way that one knows would outrage ordinary family sensibilities,[58] mutilation,[59] disturbance of burial site,[60] and interference with burial.[61] Although a cause of action existed in each of these cases, the claim belonged to the survivors of the deceased and not the deceased himself.[62] If the corpse were an entity capable of possessing rights, the action would belong to him or his personal representative.[63]

Given that the dead are not protected under the Constitution and possess no rights, does it follow that the living can make no provisions that will be honored upon death, or that society may do whatever it pleases with the body of the deceased? The simple answer to both of these questions is no. Law and public policy dictate that the stated wishes of the deceased will be honored, and what can and cannot be done to a dead body.

A DECEDENT'S ABILITY TO DISPOSE OF HIS BODY AS HE WISHES

In centuries past, a person, other than a monarch, has had little to say about what is done to his body after death.[64] Until the twentieth century, the church had primary jurisdiction over burials because they were

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[58]*See* MODEL PENAL CODE § 250.10 (stating such an act is a misdemeanor); *see also* State v. Glover, 479 N.E.2d 901 (1982) (upholding the state statutory provision, which proscribes the abuse of a corpse based on an ascertainable standard of "reasonable community sensibility").

[59]*See* Palmquist v. Standard Acc. Ins. Co., 3 F. Supp. 358 (S.D. Cal. 1933) (holding a surviving spouse may sue for damages against a person who unlawfully and without authority mutilates or destroys a deceased's body); *see also* Hall v. England, 534 S.W.2d 456 (Ky. 1976) (stating a valid cause of action for multilation or desecration of a body exists in Kentucky); RESTATEMENT (SECOND) OF TORTS § 868 (taking the view that one who intentionally, recklessly, or negligently mutilates the body of a dead person is subject to liability to a member of the family of the deceased who is entitled to disposition of the body).

[60]*See* Bessemer Land & Improvement Co. v. Jenkins, 18 So. 565 (Ala. 1895) (holding there is a cause of action for removing a body from its place of burial without proper authority, but that $1700 in damages was excessive).

[61]*See* Brown Funeral Homes & Ins. Co. v. Baughn, 148 So. 154 (Ala. 1933) (stating improper embalming which resulted in disagreeable odors and forced burial sooner than intended was actionable as interference with burial).

[62]*See* Whitehurst v. Wright, 592 F.2d 834, 834 n.9 (5th Cir. 1979).

[63]*See id.*

[64]*See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 265 (1990).

regarded as a matter of "sentiment and superstition."[65] The rise of secularism usurped the church's authority to dictate what is done to a dead body, and relegated the decision to the courts,[66] the legislature[67] and the next-of-kin.[68] It is the interaction of these three areas that presently dictates when and how the wishes of the deceased will be honored with respect to disposition of his body, and in general, what can and cannot be done to a dead body.

The States' Police Power

Even though a corpse has no cognizable constitutional rights, a person may express his dispositional desires before his death.[69] These wishes will be honored or ignored subject to the laws of the state and the rights of the surviving spouse or next-of-kin.[70] Although the time of the monarch has passed, this hierarchy exists because public health and public safety are well established functions of the state's police power.[71] The disposition of the dead falls within the parameters of the state's police power because of innate health and sanitation implications.[72] Generally, this power granted to the states cannot override any delineated constitutional rights, such as a right of privacy or any other seemingly applicable right to be buried as one wishes, but because a corpse has no rights at all, the states have the final word.[73] In the interest of society, the matter of disposition of the dead is so involved in the public interest, specifically, the public's health, safety and welfare, that it is subject to control by law instead of the fickle desires, whim or caprice of individuals.[74]

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[65] *Id.*

[66] *See id.*

[67] *See* 22A AM. JUR. 2D *Dead Bodies* § 5 (1990).

[68] *See id.* at § 1.

[69] *See id.*

[70] *See* Sacred Heart of Jesus Polish Nat'l Catholic Church v. Soklowski, 199 N.W. 81 (Minn. 1924) (holding the last wish of the deceased is to be taken into consideration regarding burial).

[71] *See* U.S. CONST. amend. X.

[72] *See* Wyeth v. Thomas, 86 N.E. 925 (Mass. 1909) (stating the mere assertion that the subject relates, through a remote degree, to the public health does not render an enactment on the subject valid, but the act must have a more direct relation as a means to an end and the end in itself must be legitimate); Fraser v. Lee, 8 Ohio App. 235 (1917) (asserting the legislature has the power to exercise complete control of the burials of the dead, as far as is necessary for the protection of public health, public safety and the detection of crimes resulting in death within the police power).

[73] *See* Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

[74] *See In re* Estate of Moyer, 577 P.2d 108 (Utah 1978); *see also Wyeth*, 86 N.E. at 925

There are a variety of ways in which the states exercise this control. For example, the location of burial grounds is a matter subject to the state police power and such power has been exercised extensively.[75] Ordinarily, the spouse or next-of-kin who has the "right of burial" may select any burial site with due deference to the wishes of the deceased.[76] As long as the provisions of the state are met, a person may be buried in any tract of land even if it has not previously been used for burial purposes.[77] However, if a person buries a body impermissibly close to inhabitants, or in other legally unacceptable places, they may be held civilly liable.[78] Some courts have even recognized that burial is not an absolute right, but a privilege or license to be enjoyed, subject to municipal regulation and control, which is legally revocable whenever the public necessity requires.[79]

Other instances of the state exercising its police power over dead bodies for the public health, safety and welfare include: if a person dies by violence or in suspicious circumstances, statutes in all states require an autopsy regardless of the wishes of the decedent or the next-of-kin,[80] and if the surviving spouse or next-of-kin who has the duty of burial neglects or refuses to do so, such actions may constitute a common law misdemeanor.[81] Similarly, any disposal of a body which is contrary to

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[75]*See* 22A AM. JUR. 2D *Dead Bodies* §10 (1990); 14 Am. Jur. 2d *Cemeteries* §§9-11 (1990).

[76]Samsel v. Diaz, 659 S.W.2d 143 (Tex. App. Corpus Christi 1983) (quoting TEX. REV. CIV. STAT. ANN. art.912a-20 (West 1982) which states that the right to control disposition of the body of a deceased person shall be vested in the surviving spouse); Fisher's Estate v. Fisher, 117 N.E.2d 855 (Ill. App. Ct. 1954) (holding burial by the consent of those having the paramount right is regarded in law as a final sepulcher which cannot be disturbed against the will of those who have the right to object, generally the next-of-kin); Haney v. Stamper, 125 S.W.2d 761 (Ky. 1939) (stating that the surviving spouse has a paramount right not only to custody of the dead body, but also to determine the time, manner and place of burial); Pulsifier v. Douglas, 48 A. 118 (Me. 1901) (specifying that it is the duty of the husband to provide a suitable place for burial of the body of his deceased wife and that once the body is buried, it becomes part of the ground).

[77]*See* Seaton v. Commonwealth, 149 S.W. 871 (Ky. 1912) (holding that the father of a deceased baby could select the place of his burial in his wood lot, rather than a public cemetery or private burying ground).

[78]*See* Tulley v. Pate, 372 F. Supp. 1064 (D. S.C. 1973).

[79]*See* Kerlin v. Ramage, 76 So. 360 (Ala. 1917) (quoting *Page v. Symonds,* that "such right of burial is not an absolute right of property but a privilege or license, to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control and legally revokable whenever the public necessity requires").

[80]*See* DUKEMINIER AND JOHANSON, *supra* note 64, at 266; *see also* 18 AM. JUR. 2D, *Coroners or Medical Examiners,* §§ 7, 77, 79 (1990).

[81]*See* Baker v. State, 223 S.W.2d 809 (Ark. 1949) (holding that indecent treatment of a corpse is an offense at common law).

common decency is a common law offense.[82] Finally, public health and public policy preclude persons from engaging in sexual activities with the dead.[83]

THE LAW OF WILLS

The law of wills also plays a pivotal role in the ability of a person to dictate the disposition of his own body. A will is a written instrument executed with the formalities required by state statutes, whereby a person makes a disposition of his property (real and personal) to take effect after his death.[84] This ability to dispose of one's property is steeped in colorful English history.[85] It is derived from the proximity of the next-of-kin to the bedside of the deceased and their ability to become the immediate occupants and possessors of the deceased's property.[86]

This English common law has evolved throughout the centuries into American statutory guidelines which allow a living person to devise or bequeath his property by will to take effect only upon his death.[87]

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[82]*See* State v. Bradbury, 9 A.2d 657 (Me. 1939) (extolling that the first requirement of a sound body of law is that it should correspond with actual feeling and demands of communities, whether right or wrong. Under common law which gives expression to people's changing customs and sentiments, acts which are highly indecent and hence contra *bonos mores*, are crimes. For example, indecently burning a dead body in a furnace is a crime); State v Harzler, 433 P.2d 231 (N.M. Ct. App. 1967) (court convicted accused of indecent treatment of a dead body based on the facts that he handled and exposed a dead woman's body for 30 days with the intent to prevent burial and to prevent discovery of the body).

[83]*See, e.g.*, CONN. GEN. STAT. § 53a-73a (1994) (prohibiting physical sexual activities with a dead body).

[84]*See* BLACK'S LAW DICTIONARY 1598 (6th ed. 1990).

[85]*Id.* 2 W. Balckstone, Commentaries *10-13. The right of inheritance, or decent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. It is probable that [the right of inheritance arose because] [a] man's children or nearest relations were usually about him on his death-bed, and are the earliest witnesses of his decease. They become, therefore, generally the next immediate occupants [of the deceased's property], till at length, in process of time, this frequent usage ripened into general law. While his property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will . . . so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we, therefore, emphatically style his *will*. *Id.*

[86]*See id.*

[87]*See* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

However, despite history and tradition that survived the journey across the sea, the court in *Irving Trust Company v. Day*[88] explicitly held that, "[n]othing in the federal Constitution forbids the legislature of a state to limit, condition or even abolish th[is] power of testamentary disposition over property within its jurisdiction."[89] Thus, wills are subject to state statutory requirements which promote swift disposition, ensure validity and provide that, when amenable, the wishes of the deceased be carried out.[90] In short, wills provide the vehicle for living persons to specify the disposal of their *property* to take effect upon their death.[91]

Traditionally, property is conceptualized as a bundle of rights which includes "the rights to possess, to use, to exclude, to profit, and to dispose."[92] The provision that wills are meant only to dispose of property is instrumental to the question of whether or not it is legal to procure sperm from a dead body. If one's body or part thereof, is considered property then a person could legally will his body, or as in question here his sperm, as he wished within the confines of the applicable state law. If on the other hand, one's body or part thereof are not held to be one's property, the law of wills would not provide a legal avenue of relief. Thus, a discussion of whether your body is your property, and therefore disposable by will, is paramount to deciding the legality of post-mortem sperm procurement.

Traditionally, at common law there is no property right in a dead body.[93] The courts specifically recognize that there can be no property

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[88] *Id.*

[89] *Id.*

[90] *See* Harkness v. Harkness, 205 Cal. App. 2d 510, 516 (Cal. Ct. App. 1962) (stating the right of inheritance, as well as the right of testamentary disposition, is entirely within the control of the state legislator and is subject only to the conditions prescribed by such body).

[91] *See id.*

[92] Brothern v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991).

[93] Spiegel v. Evergreen Cemetery Co., 186 A. 585 (N.J. 1936) (holding the right to bury the dead and preserve the remains is a quasi-property right, the infringement of which is actionable); Floyd v. Atlantic C.L.R. Co., 83 S.E. 12 (N.C. 1914) (stating at common law there can be no property right in a human body, using the word "property" in the ordinary sense); Pettigrew v. Pettigrew, 56 A. 878 (Pa. 1904) (stating, "It is commonly said, being repeated from the earlier cases in England where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property right in a corpse"); Osteen v. Southern R. Co., 86 S.E. 30 (S.C. 1942) (holding that a ticket collector wrongfully charged a man for a full ticket for his brother-in-law's corpse); *see also* Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (rejecting movant's conversion cause of action that he had a property interest in his excised tissue. "[T]he laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects

right in a body in the commercial sense,[94] and that a dead body cannot be the subject of barter or sale.[95] The laws relating to wills and the descent of property were not intended to relate to the body of a deceased.[96] Unlike chattels or property, the body of the deceased forms no part of the property of one's estate in the usual sense.[97] For example, an executor or administrator cannot maintain an action on the theory of any property in the decedent's body.[98] A dead body may not be recovered in an action in replevin based on the right of property in the corpse,[99] nor may a dead body be subject to a lien for the price of goods furnished during life, or for the value of the casket.[100]

Despite the common law that there can be no true property right in a cadaver, courts have refused to allow the doctrine to estop anyone from seeing to it that the body is properly buried and that its resting place is not disturbed.[101] Thus, a quasi-property right in dead bodies has been recognized for certain purposes.[102] It is unclear whether this quasi-

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sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials").

[94]*See* Finnely v. Atlantic Transport Co., 115 N.E. 715 (N.Y. 1917) (stating, "[t]hat there is no right of property in a dead body in the ordinary acceptation of the term is undoubtedly true when limited to property right as understood in the commercial sense"); Teasley v. Thompson, 165 S.W. 2d 940 (Ark. 1942) (holding that a dead body is not "property" in the common commercial sense of the term and is subject strictly to the laws of descent and distribution); *see also* Sullivan v. Catholic Cemeteries, Inc., 317 A.2d 430 (R.I. 1974) (a dead body is not classified as property in the true legal sense of the word).

[95]*See Finnely*, 115 N.E. at 716.

[96]*See In re Estate of* Moyer, 577 P. 2d 108, 108 (Utah 1978).

[97]*See id.*; *see also* O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899) (stating the body of one whose estate is in probate unquestionably forms no part of the property of that estate), Fisher's Estate v. Fisher, 117 N.E. 2d 855, 855 (Ill. Ct. App. 1954) (holding that a dead body forms no part of his estate for administration by an executor); Fidelity Union Trust Co. v. Heller, 84 A 2d 485 (N.J. Super. Ct. 1951) (stating not only is there no property right in a dead body, but the body is not part of the decedent's estate).

[98]*See* Gould v. State, 42 N.Y.S.2d 357 (1943).

[99]*See* 22A AM. JUR. 2D *Dead Bodies* § 161 (1990).

[100]*See* Gadbury v. Bleitz, 233 P. 299 (Wash. 1925).

[101]*See* Southern Life & Health Ins. Co. v. Morgan, 105 So. 161 (Ala. Ct. App 1926), *cert denied* 105 So. 168 (Ala. 1926) (stating that the nearest relation of a dead person may maintain an action against a wrongdoer for unwarranted interference with burial, the action being based in tort); Teasley v. Thompson, 165 S.W.2d 940 (Ark. 1942) (holding right of possession of a dead body for burial is a legal right coupled with certain duties which the courts will protect, and an unlawful interference with these rights is a basis for a suit for damages).

[102]*See* 22A AM. JUR. 2D *Dead Bodies* § 3 (1990).

property right classifies sperm as property and thus, a proper item to be willed. In an effort to quiet the debate and keep pace with modern technology, a few cases have specifically addressed the status of sperm (ova) and pre-embryos as items of property, yet none have addressed whether one can will that one's sperm be extracted posthumously.[103] Here the law has the opportunity to be proactive and decide whether sperm is property and thus may legally be disposed of by will. Such a decision would resolve some of the ambiguity over the legality of procuring sperm from the deceased.

The seminal case in this country addressing whether sperm is property and thus, legally capable of being willed is *Hecht v. Superior Court of Los Angeles County*.[104] On October 30, 1991 William E. Kane committed suicide at the age of forty-eight in a hotel room in Las Vegas Nevada.[105] Some time just prior to his demise, Kane deposited fifteen vials of his sperm in an account at California Cryobank, Inc.[106] Kane signed a "Specimen Storage Agreement" detailing the provisions of storage and the conditions for release of the vials.[107] The specimens were to be released to the executor of Kane's estate.[108] In another provision titled "Authorization to Release Specimens," Kane specifically authorized release of the specimens to Deborah Hecht or her physician.[109] Additionally, little more than a month prior to his death, decedent Kane executed a will naming Hecht as the executor of his estate and bequeathing the stored sperm to her.[110] Deborah E. Hecht was Kane's live-in girlfriend

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[103] *See* Hecht v. Superior Court of L.A. County, 16 Cal. App. 4th 836 (Ct. App. 1993); Davis v. Davis 842 S.W.2d 588 (Tenn. 1992).

[104] *See id.*

[105] *See id.*

[106] *See id.*

[107] *See id.* at 840 (discussing the storage agreement. On September 24, 1991, he signed a "Specimen Storage Agreement" with the sperm bank which provided in pertinent part that "In the event of the death of the client [William E. Kane], the client instructs the Cryobank to: Continue to store [the specimens] upon request of the executor of the estate [or] [r]elease the specimens to the executor of the estate").

[108] *See* Hecht, 16 Cal. App. 4th at 840.

[109] *See id.* (A provision captioned "Authorization to Release Specimens" states, "I, William Everett Kane . . . authorize the [sperm bank] to release my semen specimens (vials) to Deborah Ellen Hecht. I am authorizing specimens to be released to recipient's physician Dr. Kathryn Moyer." It is unclear whether the "Authorization to Release Specimens" applies to the release of specimen only during Kane's lifetime or includes release after his death).

[110] *See id.* (On September 27, 1991, decedent executed a will that was filed with the Los Angeles County Superior Court and admitted to probate. The will named Hecht as executor of the estate, and provided, "I bequeath all right, title, and interest that I may have in any specimens of

for the five years prior to his death.[111] In addition to Hecht, Kane was survived by two college-age children from his first marriage, William E. Kane Jr. and Katherine E. Kane.[112] In his will, Kane acknowledged that his adult children "are financially secure and therefore [left] them nothing other than the land included in th[e].bequest, subject to the conditions as set forth ."[113] On November 18, 1991, for reasons that are unclear, Robert L. Green was appointed special administrator of the estate of William Everett Kane.[114] On December 3, 1991, William Kane, Jr., and Katherine Kane each filed separate will contests.[115]

The issue in *Hecht* was whether sperm is considered property and, therefore, permissibly willable.[116] At a hearing on December 9, 1992, the trial court ordered the cryopreserved sperm destroyed.[117] On January 4, 1993 the court entered an order authorizing and directing the administrator "to destroy all decedent's sperm in the custody and control of California Cryobank, Inc., and in connection therewith, to instruct California Cryobank, Inc., to destroy all of the decedent's sperm in its custody and control."[118] Finding this outcome unacceptable, Hecht appealed the order.[119] The appellate court, unconvinced by the trial court's reasoning or lack thereof, stayed the execution of the order and reviewed the decision.[120]

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my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht." A portion of the will entitled "Statement of Wishes" provided, "[i]t being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of descendant's 'diplomas and framed mementos,'] to the extent that she wishes to preserve any or all of my mementos and diplomas and the like for our future child or children").

[111]*See id.*

[112]*See id.*

[113]Hecht, 16 Cal. App. at 840.

[114]*See id.* at 841.

[115]*See id.*

[116]*See id.*

[117]*See id.* at n.3 (When Hecht's counsel asked for the legal basis of the ruling, the court stated, "It really does not matter, does it? If I am right, I am right and if I am wrong, I am wrong. As you know, I am persuaded by the arguments in the moving papers. This is something that is going to have to be decided by the appellate courts. Let's get a decision." Before ruling the court also stated, "Obviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories").

[118]Hecht, 16 Cal. App. 4th at 844-45.

[119]*See id.*

[120]*See id.*

The appellate court held that the trial court abused its discretion and misapplied *Moore v. Regents of the University of California.*[121] Furthermore, the court quoting *Davis v. Davis*[122] held that the frozen sperm vials, even if not governed by the general law of personal property, occupied "an interim category that entitle[d] them to special respect because of their potential for human life."[123] Based on this reasoning, the court held that at the time of his death, the decedent had an interest in his sperm which fell within the broad definition of property in the California Probate Code and therefore was subject to probate.[124] Because there were genuine issues of material fact as to the testamentary capacity of William E. Kane at the time he executed his will, this ruling did not instantly resolve the fate of the sperm.[125] However, the court held that:

> [A]t the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the meaning of Probate Code section 62. Accordingly, the probate court has jurisdiction with respect to the vials of sperm.[126]

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[121]*Id.* at 846; Moore v. Regents of the Univ. of Cal.,793 P.2d 479, 479 (Cal. 1990) (In *Moore*, Moore underwent treatment at the University of California at Los Angeles Medical Center for a rare form of leukemia (hairy-cell). His physician realized his tissue had certain unique properties that warranted research and could lead to a profitable patent. The physician removed tissue and took blood samples beyond what was required for treatment. The physician never informed Moore of the research nor received his consent, but was successful in deriving a cell line from Moore's tissue. The physician and his colleagues received a patent. Moore sued for conversion and failing to obtain informed consent. Moore's conversion action was dismissed for failing to state a cause of action).

[122]Davis v. Davis 842 S.W.2d 588 (Tenn. 1992).

[123]Hecht v. Superior Court of L.A. County, 16 Cal. App. 4th 836, 849-50 (Ct. App. 1993); *see also Davis*, 842 S.W.2d at 956.

[124]*See Hecht*, 16 Cal. App. 4th at 850 (stating decedent had an interest in his sperm which falls within the broad definition of property in probate code section 62, as "anything that may be the subject of ownership and includes both real and personal property and any interest therein."); *see also Hecht* 16 Cal. App. 4th at 845 ("All proceedings in the probate court are limited and special or limited and statutory. The power of the probate court extends only to the property of the decedent."); Estate of Lee, 124 Cal. App. 3d 687, 692 (Ct. App. 1981) ("The right of inheritance, as well as the right of testamentary disposition, is entirely within the control of the state Legislature and is subject only to the conditions proscribed by such body." Harkness v. Harkness, 205 Cal. App. 2d 510, 516 (1962)).

[125]*See Hecht*, 16 Cal. App. 4th at 850.

[126]*Id.*

Similarly, the *Davis* court held that frozen pre-embryos were "quasi-property" because of their potential for human life.[127] Disposition of these pre-embryos, the court held, was a matter of decision for the parties contributing the gametes.[128]

In a foreign case factually similar to *Hecht*, a French tribunal held that a widow was entitled to withdraw from cryopreservation previously deposited semen of her deceased husband.[129] However, the French tribunaux of grande instance in *Parapalaix v. CECOS*[130] did not glean its decision from property law finding, "it is impossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme," but rather held that "the fate of the sperm must be decided by the person from whom it is drawn . . . [t]herefore, the sole issue becomes that of intent."[131]

Alain Parpalaix, a French citizen, was twenty-four and dying from testicular cancer.[132] Heeding warnings from his doctor that chemotherapy would leave him sterile, he made one deposit of sperm at the Centre d'Etude et de Conservation du Sperme (CECOS).[133] Like William Kane and Deborah Hecht, at the time Parpalaix deposited his sperm he was living with his girlfriend Corinne Richard.[134] Unlike Kane, Parpalaix

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[127]Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); *see also* Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348 (La. Ct. App. 1994) (holding that if a formal written act of donation is properly executed in accordance with the applicable governing laws, sperm could be the subject of such a donation); York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (resolving a bailment dispute over frozen pre-embryos by assuming, without deciding, that the dispute was over property); Del Zio v. Columbia Presbyterian Med. Ctr., No. 71- 3588 (S.D.N.Y. 1978) (memorandum decision in which a woman was awarded $50,000 for emotional distress when a doctor deliberately destroyed the contents of the petri dish in which lay her egg and her husband's sperm for *in vitro* fertilization).

[128]*See Davis*, 842 S.W. 2d at 604-05 (if the progenitors cannot agree on disposition, or their preferences are not ascertainable, or if there is dispute, then their prior agreement concerning disposition should rule. If no prior agreement exists then the relative interest of the parties in using or not using the pre-embryos must be weighed. The party wishing to avoid procreation will prevail in most scenarios).

[129]*See* T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. [1984], 11.

[130]*Id.*

[131]*Id.* at 13.

[132]*See id.* at 11.

[133]*See id.* (The Center for the Study and Conservation of Sperm is a government sperm bank in the Paris suburb of Cremlin - Bicetre.)

[134]*See* T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. [1984], 11.

married Richard two days before his death.[135] When Corinne requested Alain's sperm from CECOS, her request was denied.[136]

Eventually, Corinne, joined by her in-laws, Alain's parents, sought redress in the courts.[137] After grappling with property and contract issues, and various articles of the French Civil Code, the court dismissed the notion that "human sperm [was] moveable, inheritable property" and held that the sole issue was one of intent.[138] Based on the testimony of Alain's wife and parents, the people in the best position to ascertain Alain's intent, and Alain's actions of consciously depositing his sperm and marrying Corinne, the court held in favor of Corinne.[139]

These cases illuminate the intricacies of the law's challenge in guiding fast changing reproductive technologies. These few cases are the closest on point to addressing the issues conceptualized in post-mortem sperm procurement and sadly, they provide almost no guidance. While they may help by providing precedent for a woman to use her dead husband's sperm to reproduce, or for a man to posthumously father a child, they provide no relief for the fundamental question of post-mortem sperm procurement, can sperm be legally taken from a dead man?

It may seem apparent that women may use pre-mortem cryopreserved sperm for post-mortem conception.[140] Such logic, however, puts the cart before the horse. In the shadows of these enticing cases lurks the undetermined issues of whether a man may make provisions in his will to have his sperm procured or whether anyone else has the right to procure a man's sperm once he is dead. Presently, a corpse has no constitutional rights and sperm has not been held to be legally willable. Thus, a decedent has no legal remedies to dictate disposition of his sperm. So, in

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[135]*See id.*

[136]*See id.*

[137]*See id.*

[138]*Id.* at 13.

[139]*See* T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. [1984], 11; *see also,* Shapiro and Sonnenblick, *supra* note 28, at 30 (suggesting the very reason Alain married Corrine was to provide her access to his sperm so that she could have his child).

[140]*See* Hecht v. Superior Court of L.A. County, 16 Cal. App. 4th 836, 836 (Ct. App. 1993); T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. [1984], 11; *In re* Judith C. Hart, No. 434-52-8512 (Dept. of Health and Human Servs., Social Security Admin. March 27, 1995) (Nancy Hart gave birth to Judith Hart 355 days after the death of her husband Edward Hart using his pre-mortem cryopreserved sperm); Lisa M. Burkdall, *Dead Man's Tale: Regulating the Right to Bequeath Sperm in California,* 46 HASTINGS L.J. 875, n.22 (1995) (describing a woman, Kim Casali, who gave birth to a son using her deceased husband's pre-mortem cryopreserved sperm, and stating that no one outwardly opposed the pregnancy except the Vatican which castigated her).

an attempt to shed some light on the remaining question one must turn to the rights of the surviving spouse and next-of-kin regarding the corpse of their spouse or next-of-kin.

THE RIGHTS OF THE SURVIVING SPOUSE OR NEXT-OF-KIN

Although there is no traditional property right in a corpse, courts have recognized that a quasi-property right in dead bodies vests in the spouse or next-of-kin.[141] Additionally, there appears to be no question that the spouse or next-of-kin of the decedent, rather than others such as the executor or administrator of the decedent's estate, has the right to grant or deny permission for an autopsy to be performed.[142] The controlling principle is that there exists a quasi-property right to possess, preserve and bury, or otherwise dispose of a dead body by the surviving spouse or next-of-kin.[143] Paralleling this right, the spouse or next-of-kin has the right to

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[141]*See* Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984) (stating any quasi-property right the plaintiff had in her husband's organs, if protected by the Constitution, was also protected by the Arkansas statute); O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899) (holding that the next-of-kin does not in the full proprietary sense "own" the body of the deceased, they do have property rights in the body which will be protected); McCoy v. Georgia Baptist Hosp., 306 S.E.2d 746 (Ga. Ct. App. 1983) (announcing there is a "quasi-property right that exists in the dead body of a relative"); Randomer Russ-Pol Unterstitzung Verein v. Posner, 4 A.2d 743 (Md. 1939) (holding that the surviving husband or wife, or next-of-kin, has a quasi-property right in the dead body of the relative in the absence of any testamentary disposition, this not being a property right in the general meaning of the term, but existing for purpose of determining who shall have custody for burial purposes); Doxtator v. Chicago & W.M.R. Co., 79 N.W. 922 (Mich. 1899) (holding that although at common law there was no property right in a dead body, and while this still may be deemed an accurate technical statement, there have been a number of well-considered American cases holding that there is some property right in a dead body for purposes of burial and the like); *see also,* Barela v. Frank A. Hubble Co., 355 P.2d 133 (N.M. 1960); Parker v. Quinn-McGowen Co., 138 S.E.2d 214 (N.C. 1964); Pettigrew v. Pettigrew, 56 A. 878 (Pa. 1904); Sullivan v. Catholic Cemeteries, Inc., 317 A.2d 430 (R.I. 1974); Terrill v. Harbin, 376 S.W.2d 945 (Tex. Civ. App. Eastland 1964); Sanford v. Ware, 60 S.E.2d 10 (Va. 1950) (stating generally, that a quasi-property right exists in a dead body in various jurisdictions).

[142]*See In re* Mgurdichian, 291 N.Y.S.2d 453 (App. Div. 1968) (holding that the cause of action for an unauthorized autopsy is vested not in the executor, but in the spouse or next-of-kin who is charged by law with the duty of burial and who, by law, may authorize an autopsy); Leno v. St. Joseph's Hosp., 302 N.E.2d 58 (Ill. 1973) (holding that the right of the next-of-kin to grant or deny authority for a private or unoffical autopsy is as clear as the right of the state to perform an official autopsy when a person dies under suspicious circumstances).

[143]*See* Steagall v. Doctors Hosp., Inc., 171 F.2d 352, 353 (D.C. Cir. 1948).

consent to or deny organ procurement.[144] Specifically, these rights belong to the surviving spouse, if any, living in the normal relationship of marriage, and if none exists, then to the next-of-kin in the order of their relation to the decedent.[145] This resultant quasi-property right arises out of the spouse's or next-of-kin's duty to bury the dead, which authorizes and requires them to take possession of the dead body for internment purposes.[146] This right encompasses not only the right to possess the body for burial, but the derivative rights to prevent the corpse from disturbance after burial and to remove a body to a proper place of burial.[147] However, this quasi-property right is limited to determining the custody of the body for burial.[148] Once the body is properly interred, the custody of the body ceases to vest in the spouse or next-of kin and escheats by law to the state.[149]

Although common law provides for a vested property right in the spouse or next-of-kin to bury the deceased, some courts recognize a right of a person to dispose of his own body in his will.[150] This is an unusual outcome given that a body is not legally acknowledged property and that the contraindicated purpose of wills are for the disposal of property. The surviving spouse or next-of-kin is instrumental in exercising the wishes of the decedent within the constraints of state law, but when conflict and confusion present themselves, the courts provide the venue of resolution.

THE ROLE OF THE COURTS

The courts exercise a "benevolent discretion" when presiding over the wishes of the deceased.[151] Should the decedent's wishes be reasonable and

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[144]*See* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 § 3 (Supp. 1989) (listing the order of priority of the classes which can provide consent to organ procurement on behalf of the decedent.)

[145]*See Steagall*, 171 F.2d at 353.

[146]*See* Nicholas v. Central Vt. Ry. Co., 109 A. 905 (Vt. 1919).

[147]*See* 22A AM. JUR. 2D *Dead Bodies*, §§ 21, 70, 82 (1990).

[148]Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103 (Ct. App. 1976).

[149]*See* 22A AM. JUR. 2D *Dead Bodies*, § 70 (1990).

[150]*See* Holland v. Metalious, 198 A.2d 654 (N.H. 1964) (holding that in the ordinary case, instructions be a decedent, by will or otherwise, with respect to disposition of his body, or funeral services, or burial, should be respected and followed in preference to opposing wishes of his survivors); *In re* Estate of Moyer, 577 P.2d 108 (Utah 1978) (stating a person has an interest in his body and organs of such a nature that he should be able to make a disposition thereof which should be recognized and held binding after his death).

[151]DUKEMINIER AND JOHANSON, *supra* note 64.

not in serious conflict with the desires of the living or in opposition to the law or public policy, a person can feel reasonably comfortable that his wishes will be executed upon his death.[152]

In *Holland v. Metalious*,[153] Grace Metalious, author of the novel *Peyton Place*, forbade funeral services in her will.[154] When the provision was challenged by her family, the court upheld her wish as a reasonable request.[155] Similarly, when Sandra Ilene West died having devised her multimillion dollar estate to her brother-in-law on the condition that she be buried in her 1964 baby-blue Ferrari dressed in a lace nightgown and with the seat slanted comfortably, the court granted the brother-in-law's petition that she be buried in the manner directed by her will.[156] However, in *In re Meksrus Estate*,[157] the court refused to enforce the wishes of the deceased that she be interred with diamonds, jewelry and paintings because it was against public policy and void.[158] The court reasoned that to grant the decedent's wishes "is almost certain to tempt some people and invite others to overt action to procure the 'buried treasure.'"[159] The aforementioned examples are not solely examples of the court's role in resolving questionable wishes, but also illustrate their role in resolving problems that arise when wills are not drafted in accord with statutory guidelines or contain questionable dispositions.

Wills are a means by which a person devises of his property to take effect upon his death. The court's role in this process of honoring the wishes of a decedent with respect to wills is twofold. First, where a will is suspect, the probate court provides a venue to resolve the dispute. Or where a devisor has requested actions or devised objects beyond the parameters of that which is statutorily permissible in wills, such as when a devisor attempts to devise objects other than disposable property, the court will often be the catalyst to resolve the conflict. Secondly, where a person dies intestate, without a will, the courts may provide remedial testamentary disposition, by applying the intestacy statutes. There are many facets to the common law and statutory regulation of wills which are

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[152]*See infra*, notes 153-59 and accompanying text.
[153]*See Holland*, 198 A.2d at 654.
[154]*See id.*
[155]*See id.*
[156]*See* L.A. TIMES, May 20, 1977 pt 1 at 3.
[157]*In re* Meksrus Estate, 24 Pa. Fiduc. 249 (Orph. Ct. 1974).
[158]*See id.*
[159]*Id.*

beyond the scope of this paper. Suffice it to say that both the courts and the legislature combine efforts to facilitate disposition of a decedent's estate while honoring his wishes.

CAVEAT TO THE RULE: THE UNIFORM ANATOMICAL GIFT ACT

While it is well established that there is no true property right in a corpse, and that therefore, a corpse cannot be devised consistent with the law of wills, public policy has carved an exception to this rule. Two factors solidified this public policy exception. First, cadavers for scholarly study and research have been and continue to be vital to the education of medical students and the progress of medical knowledge.[160] Second, advances in medical technology have enabled physicians to successfully transplant organs from the recently deceased to the gravely ill.[161] This latter factor provided the impetus for the Uniform Anatomical Gift Act (UAGA).[162] Organ transplantation technology, coupled with the fundamental principle of saving human lives, has, in recent decades, defined the ever-pressing need for transplantable organs.[163] To fill this need, UAGA was initially promulgated in 1968 to provide a statutory framework whereby a person could legally devise all or part of his body for specified purposes.[164] Such an instrument was intended to increase the pool of organs for transplantation and the potential of saving human lives.[165]

UAGA has been adopted, either verbatim or in a modified form in every state.[166] In pertinent part it provides that:

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[160]*See* JESSICA MITFORD, THE AMERICAN WAY OF DEATH 85-89 (1978).

[161]*See* ARTHUR CAPLAN, IF I WERE A RICH MAN COULD I BUY A PANCREAS? 145-77 (1994).

[162]*See* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989) (Prefatory Note) (discussing the disarray of the laws pertaining to anatomical gifts prior to 1968 which are described as a confusing mixture of old common law dating back to the 17th century and state statutes that had been enacted from time to time).

[163]DUKEMINIER AND JOHANSON, *supra* note 64, at 266-67; *see also* Caplan *supra* note 161, at 145-77.

[164]*See* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989) (Prefatory Note).

[165]*See id.*

[166]*See* DUKEMINIER AND JOHNSON *supra* note 64, at 266-67; *see also* Caplan *supra* note 161, at 145-77.

(a) an individual who is at least [18] years of age may
  (i) make an anatomical gift for any of the purposes states in Section 6(a),
  (ii) limit an anatomical gift to one or more of those purposes,

  (iii) refuse to make an anatomical gift.[167]

Section 6(a)
(a) (1) the following persons may become donees of anatomical gifts for the purposes states:
  (2) a hospital, physician, surgeon, or procurement organization *for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science*;
  (3) an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or
  (4) *a designated individual for transplantation or therapy needed by that individual.*[168] (emphasis added)

Under the original UAGA of 1968, an anatomical gift could be made by a duly executed will or by a donor card which was to be "signed by the donor in the presence of two witnesses who must sign the document in his presence."[169] To facilitate organ donation, the revised UAGA of 1987 eliminated this witnessing requirement. All that is necessary under the present version of UAGA is "a document of gift signed by the donor."[170] Furthermore, the ability to devise one's organs by a duly executed will in accord with the provisions of UAGA exists, even though such a provision is unlikely to be fruitful given the time demands of probate and the time constraints of transplantation.[171]

In the absence of proper documentation or contraindication, and in the interest of procuring organs to save lives, section 3 of UAGA provides that:

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[167]UNIFORM ANATOMICAL GIFT ACT § 2(a) (1987).
[168]UNIFORM ANATOMICAL GIFT ACT § 6(a) (1987).
[169]UNIFORM ANATOMICAL GIFT ACT § 4(a) (1968).
[170]UNIFORM ANATOMICAL GIFT ACT § 2(b) (1987).
[171]*See* UNIFORM ANATOMICAL GIFT ACT § 2(e) (1987).

(a) any member of the following classes of persons, in order of the priority listed, may make an anatomical gift of all or part of a decedent's body for *authorized purposes:*
(1) the spouse of the decedent;
(2) the adult son or daughter of the decedent;
(3) either parent of the decedent;
(4) an adult brother or sister of the decedent;
(5) a guardian of the person of the decedent at the time of death.[172] (emphasis added)

Here the promotion of public policy and the consistency in the law is evidenced by the fact that common law establishes a quasi-property right in the surviving spouse or next-of-kin to dictate burial of the deceased and other associated proceedings, and UAGA vests power in the surviving spouse or next-of-kin to consent to whole body or organ donation.

DOES THE UAGA RESOLVE THE LEGAL CONUNDRUM CREATED BY POST-MORTEM SPERM PROCUREMENT?

As sperm is human tissue, a more compelling case could be made for the legality of post-mortem sperm procurement if UAGA, which governs organ and tissue donation were specifically applicable. However, it is not. UAGA clearly states that an "anatomical gift," which is defined as a donation of all or part of a human body to take effect upon death or after death, is limited to one or more of the stated purposes of section 6(a).[173] "All or part of a human body" theoretically at least includes sperm. However, section 6(a) does not provide that an anatomical gift may be used for conception. It does provide that such a gift may be made to a designated individual for transplantation or therapy *needed* by that individual.[174] While an argument can be made for construing assisted reproductive technologies employed to achieve conception as therapy, the requirement that the individual *need* the procedure is a formidable impediment to the applicability of UAGA to post-mortem sperm procurement. A simple amendment to UAGA permitting anatomical gifts

[172]UNIFORM ANATOMICAL GIFT ACT § 3 (1987).
[173]UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989).
[174]*See* UNIFORM ANATOMICAL GIFT ACT § 6(a) (1987).

for use in conception might resolve the present conundrum, at least on the legal level.

The key word is "might," because there is one final constraint at common law that has yet to be mentioned regarding offenses against dead bodies, that is, treating a corpse in a manner that would outrage and offend reasonable community standards is illegal.[175] To limit any potential offensiveness, a proposed amendment might decry the use of posthumously procured sperm for all purposes except procreation. It could explicitly ban procurement for experimentation or other practices to deter the misuse of the procedure. Additional restrictions might also be implemented based on "reasonable community standard" and the goals of the policy.

IS IT LEGAL TO TAKE SPERM FROM A DEAD MAN?

To determine whether it is legally permissible to take sperm from a dead man to create a new life, we must first summarize the applicable laws relating to dead bodies and determine if it is legally permissible to perform post-mortem sperm procurement.

The aforementioned law pertaining to dead bodies can be summarized, for purposes of applying it to the question at issue, as follows. First, a corpse has no constitutional rights or cognizable interests. Therefore, individuals have no absolute right to dispose of their bodies or parts thereof by will or other means. However, the wishes and desires of the deceased are to be honored by the surviving spouse or next-of-kin who has dispositional authority so long as the wishes are not against the law or public policy. The exception to this rule is that in the interest of saving lives, UAGA permits a person to legally devise of all or part(s) of his body, subject to the statutory provisions.[176]

It is the surviving spouse or next-of-kin who has a legally cognizable quasi-property right in a dead body. This right encompasses the right to bury or to cremate the deceased, to choose a specific place of burial, to request and to consent to an autopsy and to consent to whole body or

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[175] *See e.g.*, MODEL PENAL CODE § 250.10.

[176] *See* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989).

organ donation, provided that the deceased had made no provisional indications to the contrary.[177]

Balancing these permissible rights are some limitations imposed under the guise of the state's police power in the interest of the public health, safety, and welfare. Despite the rights vested in the surviving spouse or next-of-kin and the state, no one may mutilate, desecrate or have sex with a dead body, and the whole body or part thereof may not be donated in the face of explicit disapproval by the deceased when alive.[178]

Conspicuously absent from these laws and prohibitions is the answer to the question, whether or not post-mortem sperm procurement is legally permissible. It is only through extrapolation and analysis that a resolution is reached.

Given the absence of rights possessed by the deceased, a shift in focus to the dispositional rights of the surviving spouse and next-of-kin is necessary to resolve the post-mortem sperm procurement question. Without doubt, there is a quasi-property right vested in the surviving spouse or next-of-kin.[179] Given this premise, at the heart of the analysis is the surviving spouse's or next-of-kin's right to consent to or to deny permission to perform an autopsy or organ procurement procedure.[180] However, before reaching the issue of consent, it must be determined whether the procedures of autopsy, organ procurement and post-mortem sperm procurement are medically indistinguishable.

Autopsies and organ procurement are medical procedures because they are invasive operations that can only be performed by specially trained, licensed physicians.[181] Similarly, post-mortem sperm procurement may be performed in one of two ways: by a minimally invasive medical procedure or by electroejaculation.[182] Both of these techniques also require a specially trained licensed physician to perform the task.[183] Thus, by this definition autopsies, organ procurement, and post-mortem sperm procurement are medically indistinguishable.

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[177]*See supra* notes 76, 142-49 and accompanying text.

[178]*See supra* notes 59-61 and accompanying text; *see also* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989).

[179]*See supra* notes 141-49 and accompanying text.

[180]*See* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989).

[181]*See generally* UNIFORM ANATOMICAL GIFT ACT, 8A U.L.A. 1-47 (Supp. 1989).

[182]*See supra* notes 15-17.

[183]*See supra* notes 15-17.

Acknowledging the similarities of the procedures, if the surviving spouse or next-of-kin has the legal right to consent to or to deny permission for autopsies and organ procurement, would not the same right extend to consenting to or denying permission to perform post-mortem sperm procurement? Arguably yes.

However, no right is absolute and all rights are subject to certain constraints. The first constraint is that engaging in sexual contact with a dead body, commonly referred to as necrophilia, is illegal.[184] However, necrophilia is defined as an obsession with and unusual erotic interest in or stimulation by corpses.[185] While the former is clearly illegal, the latter is a mental condition that, depending on its manifestation, may or may not be illegal. Regardless of the semantics, it can be argued that the medical procedure of post-mortem sperm procurement does not constitute an illegal act. Support for this reasoning can be derived from the fact that post-mortem sperm procurement is a medical procedure and not a sexual act, and electroejaculation is also a medical procedure and not a sexual act that is performed on living men, primarily those suffering from lower body paralysis.[186]

A second constraint is the legal prohibition against rape and sexual assault. Post-mortem sperm procurement, however, does not constitute rape or sexual assault. Unlike necrophilia, rape and sexual assault require a live victim because they must be accomplished with a person against that person's will.[187] A dead body cannot consent to nor protest a rape, and therefore cannot be in fear of imminent and unlawful bodily harm as is required by law.[188]

A third consideration is that post-mortem sperm procurement would constitute mutilation, but this is unlikely as well. Given that one procedure, electroejaculation, requires no cutting into the body and the other procedures require a minimal incision, in comparison to an autopsy or an organ procurement operation, post-mortem sperm procurement would not constitute mutilation. It is significantly less invasive than

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[184]*See e.g.*, CONN. GEN. STAT. § 53a-73a (1994).

[185]*See* WEBSTER'S NEW COLLEGIATE DICTIONARY (9th ed. 1988).

[186]*See* Pak H. Chung et al., *Assisted Fertility Using Electroejaculation in Men with Spinal Cord Injury-A Review of Literature*, 64 FERTILITY & STERILITY 1 (1995).

[187]*See* MODEL PENAL CODE § 22.011.

[188]*See id.*

presently approved and practiced medical procedures performed on cadavers.

Similarly, post-mortem sperm procurement would not constitute desecration because by definition desecration is the defacing, damaging, polluting or otherwise physically mistreating [a corpse] in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.[189] Post-mortem sperm procurement does not entail "defacing, damaging, polluting, or otherwise physically mistreating [a corpse]."[190] It is simply a minimally invasive medical procedure. It is unlikely to outrage a physician who performs the procedure and who is thereby the principle observer. Furthermore, it is unlikely to outrage the surviving spouse or next-of-kin who requests the procedure. It would be up to the courts to decide whether the procedure outraged the sensibilities of other persons likely to discover that the procedure was performed. Clearly, however, requiring confidentiality could prevent the latter from having to be decided.

It appears then that post-mortem sperm procurement is a medical procedure not unlike an autopsy or an organ procurement operation. It appears that the surviving spouse or next-of-kin has the right to consent to or deny consent for an autopsy or organ procurement procedure, and that this right would extend to authority over post-mortem sperm procurement. It also appears that none of the potential constraints to restrict the performance of post-mortem sperm procurement are valid. Therefore, if legally challenged a right to perform post-mortem sperm procurement would be recognized.

Having established the potential legality of taking sperm from a dead man it is now appropriate to address the second question of the post-mortem sperm procurement conundrum, what can be done with the posthumously procured sperm and by whom?

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[189] *See* MODEL PENAL CODE § 250.9.
[190] MODEL PENAL CODE § 250.10

PROCREATIVE LIBERTY: AN ARGUMENT FOR THE RIGHT TO AND NOT TO REPRODUCE COITALLY AND NON-COITALLY

A corpse has no constitutional rights. Therefore, it is not necessary to address the right to or not to procreate on behalf of the deceased man whose sperm was procured, because no such rights exist. As a result, this section will discuss procreative liberty - the right to and not to procreate - vested in the surviving spouse or next-of-kin, and whether such rights extend to non-coital reproduction with a dead man's sperm.

In 1965, Justice Douglas speaking for the Court toured the Bill of Rights and established a constitutional right to use contraceptives.[191] He found this liberty grounded in a right of privacy which he derived from analogous First Amendment cases.[192] The decision was reached after a physician and a married couple challenged a Connecticut statute which prohibited the use and distribution of contraceptives.[193] Although the married couple challenging the statue were not formally charged, the court couched its opinion in terms of married couples.[194] Justice Douglas queried, "[w]ould we allow the police to search the sacred precincts of married bedrooms for telltale signs of the use of contraceptives?"[195] He then rhetorically responded, "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship."[196]

From contraception to abortion the Supreme Court has already clearly established a well pronounced right not to procreate.[197] The burdens of unwanted pregnancy and child rearing are deemed so substantial that any competent person - married, single, adult, or minor - may use

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[191] *See* Griswald v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[192] *See Griswald,* 381 U.S. at 479.

[193] *See id.*

[194] *See id.*

[195] *Id.* at 485.

[196] *Id.* at 485-86.

[197] *See Griswald,* 381 U.S. at 485-86 (holding that there is a Constitutional right to use and dstribute contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (holding that there is a Constitutional right to an abortion based on a trimester scheme, dictated by viability); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade* by holding that a woman, single or married, adult or minor, has a right to terminate a pregnancy up to the point of viability).

contraceptives to avoid pregnancy, and choose to abort until the time of viability.[198]

Procreative liberty includes not only the right not to procreate but a right to procreate; in essence, to do those things that will lead to biological descendants.[199] The right to reproduce, if anything, is a right against public or private interference.[200] It is not a positive right to the services or resources needed to reproduce.[201] This right, while undeniably significant, has never received explicit legal recognition. The absence of an articulated doctrine is a result of the fact that the state has never attempted to restrict married couples from having children when, and however, they can.[202] Thus, without a state actively restricting or regulating procreation, a challenge cannot be brought to define the parameters of this presently unarticulated amorphous right. Despite the legal absence of a recognized right, several international declarations respect the right to reproduce as a basic human right. For example, in 1978 the United Nations' Universal Declaration of Human Rights stated, "men and women of full age . . . [have the right] to marry and found a family."[203] Similar adages have been expressed by the International Covenant of Civil and Political Rights and the European Convention on Human Rights.[204] However, these declarations have not been ratified by the United States, and therefore, have no legal effect.[205]

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[198]*See id; see also* John A. Robertson, *The Constitutional Aspects of Procreative Liberty,* 62 FERTILITY & STERILITY 3S, 3S (1994).

[199]*See* Robertson, *supra* note 198 at 3S.

[200]*See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 29 (1994).

[201]*See id.*

[202]*See* Robertson, *supra* note 198, at 3S; *see also* Danridge v. Williams, 397 U.S. 471 (1970) (discussing that indirect restrictions on welfare benefits are not considered restrictions on procreative choice); ROBERTSON, *supra* note 200, at 29-30.

[203]Robertson, *supra* note 198, at 3S; ROBERTSON, *supra* note 200, at n.31.

[204]*See* The International Convention of Civil and Political Rights, Art. 23 (1976); European Convention on Human Rights Art. 12 (1953).

[205]*See* Robertson, *supra* note 198, at 3S.

A CONSTITUTIONAL RIGHT TO PROCREATE

Because there have been few attempts by government to limit reproduction there is little explicit law concerning the right to reproduce.[205] Yet on several occasions, the Supreme Court has indicated strong support for a married couple's right to reproduce,[207] and lower court judges have often referred to such a right in dicta.[208] Although these cases have not involved state attempts to prevent married couples from reproducing, they do suggest that if a court were confronted with a direct limitation on a married couple's desire to reproduce by sexual intercourse the court would explicitly recognize a right to procreate.[209] From 1942 to the present a series of cases have alluded to this unwritten right to procreate.[210] The broad language of these cases appears to indicate this right is applicable to both coital and non-coital reproduction.

The strongest precedent is the 1942 case of *Skinner v. Oklahoma*.[211] In this case the court struck down a mandatory sterilization law that applied to thieves but not embezzlers.[212] The Court resolved the issue on equal protection grounds while stressing the importance of marriage and procreation as among "the basic civil rights of man."[213] The Court went on to note that, "marriage and procreation are fundamental to the very existence and survival of the race."[214] Such statements suggest that laws restricting coital reproduction would have to surpass strict constitutional scrutiny by articulating a compelling state interest that could not be met in any other manner.[215]

This sentiment has been supported in other Supreme Court decisions as well. In *Meyer v. Nebraska*,[216] the Court affirmed the right of parents to permit their children to learn a foreign language stating that constitutional liberty encompassed "the right of an individual to marry,

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[205] *See* ROBERTSON, *supra* note 200, at 35.
[207] *See* Robertson, *supra* note 198, at 3S.
[208] *See* ROBERTSON, *supra* note 200, at 35.
[209] *See* Robertson, *supra* note 198, at 3S.
[210] *See infra* notes 212-39 and accompanying text.
[211] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[212] *See id.*
[213] *Id.*
[214] *Id.*
[215] *See* ROBERTSON, *supra* note 200, at 36.
[216] Meyer v. Nebraska, 262 U.S. 390 (1923).

establish a home and bring up children."[217] In *Stanley v. Illinois*,[218] the Court resolved questions surrounding an unmarried father's right to rear his child in favor of the father stating, "the rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious than property rights."[219] When a pregnant teacher wished to continue teaching, the Court in *Cleveland Board of Education v. LaFleur*[220] supported her decision stating, "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment."[221] John Robertson, a leading scholar from the University of Texas, suggests the most "ringing endorsement" of the right to procreate was the *Eisenstadt v. Baird*[222] decision extending the right to obtain contraceptives to unmarried persons.[223] This ringing endorsement echoed from Justice Brennan when he penned, "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[224] Recently, Justices O'Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[225] stated, "[o]ur law affords constitutional protection to personal decisions relating to marriage, *procreation*, contraception, family relationships, childrearing and education. . . . These matters, involving the most intimate and personal choices a *person* may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment." (emphasis added).[226]

Such statements suggest that a married couple's right to reproduce would be recognized by even conservative courts, since coital reproduction has been traditionally recognized as one of the main

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[217] *Id.* at 399.
[218] Stanley v. Illinois, 405 U.S. 645 (1972).
[219] *Id.* at 651.
[220] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1973).
[221] *Id.* at 639-40.
[222] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[223] ROBERTSON, *supra* note 200, at 36; *Eisenstadt*, 405 U.S. at 453.
[224] *Eisenstadt*, 405 U.S. at 453.
[225] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
[226] *Casey*, 505 U.S. at 851; see ROBERTSON, *supra* note 200, at 37 and n.46.

functions of marriage and family.[227] The holdings' singular language hints that this liberty interest might also apply to unwed persons.[228]

Although most of the Supreme Court dicta cited above pertains to married couples, a strong argument can be made to parlay this right to unmarried persons.[229] Unmarried persons may have the same or similar needs and desires to have and rear biological descendants as do married persons.[230] They may also be excellent child rearers and supportive parents. To ban procreation by a single person by any means seems inconsistent given that unmarried persons cannot be forced to use contraception, abort, or relinquish an illegitimate child.[231]

Most recently in *Davis v. Davis*[232] the Tennessee Supreme Court announced that, "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance-- the right to procreate and the right to avoid procreation."[233] The court attempted to balance the right of Mary Sue Davis who wanted to use the cryopreserved pre-embryos of her and her then husband, Junior Davis, to procreate or donate for others to use to procreate, with Junior Davis' right to avoid any such procreation.[234] The court acknowledged that the scale tipped in favor of the woman's right to procreate quoting *Planned Parenthood of Central Missouri v. Danforth*[235] which said, "in as much as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[236] Nonetheless, the case was resolved in favor of Junior Davis' right not to procreate, in part, because Mary Sue Davis wished to donate the pre-embryos to another couple as opposed to having them implanted in her uterus.[237] Despite this ultimate outcome the court stated, "the case would be closer if Mary Sue Davis were seeking to use the pre-embryos herself, but only if she could not

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[227]*See* ROBERTSON, *supra* note 200, at 37 and n.46.

[228]*See* ROBERTSON, *supra* note 200, at 37 and n.46.

[229]*See* Robertson, *supra* note 198, at 4S; Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Carey v. Population Services, 431 U.S. 678 (1977).

[230]*See* Robertson, *supra* note 198, at 4S.

[231]*See* Robertson, *supra* note 198, at 4S.

[232]Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)

[233]*Id.* at 601.

[234]*See id.*

[235]Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976).

[236]*Id.* at 71.

[237]*See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

achieve parenthood by any other means."[238] This statement is not only strong evidence that if directly challenged the court would recognize a right to procreate for married and unmarried women alike, but suggests that under certain circumstances the right to procreate might outweigh the right to avoid procreation.

Despite this dicta and seemingly rational argument, it remains unclear how the Supreme Court would resolve a challenge to an unmarried person's right to procreate. The right to procure contraceptives and continue a pregnancy does not necessarily implicate a single person's right to conceive in the first place.[239] This is notable because all actions that may lead to procreation are not protected by a constitutional right. For example, the Court has never acknowledged a right to engage in fornication, adultery, rape or incest even though such activity could lead to procreation.[240] The Court might be extremely reluctant to strike down fornication laws on the ground that they interfere with non-marital procreation, much less recognize the right to engage in adulterous, polygamous, or incestuous sex.[241] Similarly, they certainly would not strike down rape statutes as an infringement on procreative liberty.[242] However, the dicta in *Davis* and reality tells us that with more than 31 percent of births in 1993 occurring out of wedlock, the Court would be hard pressed to effectuate laws prohibiting non-marital sex or penalizing unmarried reproduction.[243]

Finally, the absence of a recognized constitutional right of single persons to procreate does not make it unlawful or unethical for physicians to treat pregnant women or to assist them in reproducing.[244] Thus, it is legally and ethically permissible for physicians to treat unmarried persons in the absence of any state or federal laws to the contrary.[245]

In short, there is an unquestioned right to avoid procreation and strong evidence that a right to procreate would be articulated if a court were presented with a direct challenge. While it appears that this

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[238] *Id.*

[239] *See id.*

[240] *See* ROBERTSON, *supra* note 200, at 38.

[241] *See* ROBERTSON, *supra* note 200, at 38.

[242] *See* ROBERTSON, *supra* note 200, at 38.

[243] *See* ROBERTSON, *supra* note 200, at 38; Robert J. Samuelson, *The Politics of Ignorance*, NEWSWEEK, Dec. 18, 1995, at 45.

[244] *See* Robertson, *supra* note 198, at 4S.

[245] *See* Robertson, *supra* note 198, at 4S.

procreative liberty may extend to both married and unmarried persons, it also seems to pertain primarily to coital reproduction. This is evidenced by the fact that many of the cases discussed herein were decided before the advent of the "reproductive revolution" and none of these cases, with the exception of *Davis,* alludes to the effects of third party participation. Thus, it is necessary to determine if the right to reproduce extends to non-coital reproduction to resolve the matter at issue.

NON-COITAL REPRODUCTION AS AN ASPECT OF PROCREATIVE LIBERTY

Similar to legal status of the right to reproduce in general, the law has not confronted the right of those needing assistance to reproduce. However, the principles that underlie a constitutional right to reproduce would likely apply to those needing assistance because a couple's or a person's interest in reproducing is the same no matter how reproduction occurs.[246]

Coital reproduction is legally protected not for the coitus but for what the coitus makes possible: it enables the couple to unite egg and sperm in order to acquire the possibility of rearing a child of their own genes and gestation.[247] The desire to have a family, to beget, bear, and rear offspring, is as strong in those needing assistance as in those who can reproduce coitally.[248] Because the same values and interests that underlie the right to coitally reproduce exist for the coitally infertile, their actions to form a family deserve respect.[249] Furthermore, state action to restrict non-coital reproduction should be held to the same standard as would state action to restrict non-coital reproduction, *i.e.* strict scrutiny. The use of various assisted reproductive technologies, such as artificial insemination or in vitro fertilization (IVF), should be protected.[250] If protection is granted, a couple would have the right to create, store and have transferred to them extracorporeal pre-embryos created by their sperm and egg.[251] Such protection might also include the right to employ a third party donor or

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[246]*See* Robertson, *supra* note 198, at 4S; ROBERTSON, *supra* note 200, at 39.
[247]*See* Robertson, *supra* note 198, at 4S; ROBERTSON, *supra* note 200, at 39.
[248]*See* Robertson, *supra* note 198, at 4S; ROBERTSON, *supra* note 200, at 39.
[249]*See* Robertson, *supra* note 198, at 4S; ROBERTSON, *supra* note 200, at 39.
[250]*See* Robertson, *supra* note 198, at 5S.
[251]*See* Robertson, *supra* note 198, at 5S.

surrogate to provide the gametes or uterine function required for a couple to exercise their right to reproduce.[252]

Not everyone agrees that a right to reproduce by definition encompasses a right to assistance.[253] Those who disagree argue that there is no legal right to reproduce if one lacks the unassisted physical ability to do so.[254] However, John Robertson refutes this argument with an illustrative analogy about blindness and the First Amendment right to read books.

> Surely a blind person has the same right to acquire information from books that a sighted person has. The inability to read visually would not bar the person from using Braille, recordings, or a sighted reader to acquire the information contained in a book. Because receipt of the book's information is protected by the First Amendment, the means by which the information is received does not itself determine the presence or absence of First Amendment rights. Similarly, if rearing, begetting or parenting children is protected as part of a personal privacy or liberty, those experiences should be protected whether they are achieved coitally or non-coitally.[255]

Similarly, not everyone agrees with the inclusion in a right to procreate of the use of a surrogate.[256] Opponents point out that the courts have not acknowledged a constitutional right to the enforcement of surrogacy contracts.[257] They go on to argue that even if a right to procreate were specifically announced, surrogacy would be distinguishable because of the intricacy and impacts of gestation.[258]

Surrogacy aside, non-coital reproduction should be equated to coital reproduction as both are grounded in identical desires and values associated with conceiving, bearing and raising a child.[259] These rights should not be overridden by religious or moral objections to the separation

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[252]*See* Robertson, *supra* note 198, at 5S.
[253]*See* ROBERTSON, *supra* note 200, at 39.
[254]*See* ROBERTSON, *supra* note 200, at 39.
[255]ROBERTSON, *supra* note 200, at 39.
[256]*See* Robertson, *supra* note 198, at 5S.
[257]*See* Robertson, *supra* note 198, at 5S.
[258]*See* Robertson, *supra* note 198, at 5S.; *see e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988).
[259]*See* ROBERTSON, *supra* note 200, at 39.

of sex and reproduction.[260] They should be constitutionally protected subject to the burden of strict scrutiny. To defeat such rights the state would have to announce a compelling state interest that non-coital reproduction would violate if left unregulated. Applying the concept of a constitutionally protected procreative liberty to reproduce both coitally and non-coitally, it appears that using the sperm of a deceased man would be protected under the constitutional umbrella.

CONCLUSION

The majority of this paper discussed whether it was legal to take sperm from a cadaver.[261] By applying the relevant law and extrapolating when necessary, it was concluded that it was legally permissible for the surviving spouse or next-of-kin to consent to and to have the sperm of a deceased spouse or next-of-kin removed. Having established the legality of the medical procedure, a section addressing procreative liberty outlining the established right not to procreate and arguing for an inferred right to procreate.[262] This procreative liberty covered both coital and non-coital reproduction as the latter was implicated in this issue. From the argument presented it could be concluded that there are supportive evidence and strong arguments for the right to procreate as one chooses, even with the sperm of a deceased male. Thus, just one question remains: "even though it may be legal to perform post-mortem sperm procurement for the purpose of reproduction, *should* it be done?"

Presently this question remains an individual decision for physicians, and spouses or next-of-kin to make. However, post-mortem sperm procurement is a prime opportunity for the law to proactively influence the burgeoning field of reproductive technology. By amending section 6(a) of UAGA to include removal of tissue (sperm) posthumously for purposes of procreation, consistency and a basis for informed decision-making in the era of the "reproductive revolution" would be fostered, which may avoid potential litigation.

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[260] *See* ROBERTSON, *supra* note 200, at 39.
[261] *See infra* pp. 48-70.
[262] *See infra* pp. 70-8.